86-389

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1986

CITY OF BIRMINGHAM,

Petitioner,

v.

AMERICAN CIVIL LIBERTIES UNION and MICKI LEVIN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

– AND APPENDIX –

BEIER, HOWLETT, HAYWARD, MCCANN, JONES, KINGSEPP & SHEA
By: JON H. KINGSEPP (P15982) *
Attorneys for Petitioner
74 W. Long Lake Road, Suite 1
Bloomfield Hills, Michigan 48013
(313) 645-9400

* *Counsel of Record*

Interstate Brief & Record Co., Suite 731, David Whitney Building, Detroit, MI 48226
(313) 962-8745

QUESTIONS PRESENTED

I.

WHETHER THE SEASONAL DISPLAY OF A CHRISTMAS NATIVITY SCENE BY THE CITY OF BIRMINGHAM ON PUBLIC PROPERTY, UNACCOMPANIED BY OTHER SECULAR DECORATIONS, VIOLATES THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

II.

WHETHER A VIOLATION OF THE ESTABLISHMENT CLAUSE MAY BE BASED SOLELY ON A FINDING OF A SYMBOLIC MESSAGE OF ENDORSEMENT OF RELIGION.

III.

WHETHER THE SIXTH CIRCUIT DECISION IN THIS CASE PRESENTS A CONFLICT WITH *LYNCH* v *DONNELLY* AND WITH THE SECOND CIRCUIT DECISION OF *McCREARY* v *STONE*.

LIST OF ALL PARTIES

All of the parties to this action are listed in the caption.

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CITY OF BIRMINGHAM,

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v.

AMERICAN CIVIL LIBERTIES UNION
and MICKI LEVIN,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, City of Birmingham, petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit entered June 11, 1986.

OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Sixth Circuit appears in Appendix A to the Petition (beginning at page A-1), and is reported at 791 F2d 1561 (1986). The opinion of the United States District Court for the Eastern District of Michigan, Southern Division is reported at 588 F Supp 1337 (1984), and is set forth in Appendix B (beginning at page B-1).

JURISDICTION

1. The judgment of the United States Court of Appeals for the Sixth Circuit was entered on June 11, 1986. (Appendix A, *infra,* page A-1). The Court of Appeals' decision is final.

2. The jurisdiction of this Court is invoked under the First Amendment of the Federal Constitution. The Petitioner has been denied its rights guaranteed by the Constitution by the Sixth Circuit's decision which upheld the District Court ruling granting the Respondents a permanent injunction restraining Petitioner from erecting a city-owned nativity scene on municipal property during the Christmas Holiday season.

3. The Constitutional question was raised in the District Court and in the Sixth Circuit by continued dispute over the central issue, the applicability of *Lynch* v *Donnelly,* 465 US 668, 79 L Ed 2d 604, 104 S Ct 1355 (1984), reh den __ US __, 80 L Ed 2d 848, 104 S Ct 2376 (1984), which held "notwithstanding the religious significance of the crèche the City of Pawtucket has not violated the establishment clause of the First Amendment." 465 US 668, 687.

CONSTITUTIONAL PROVISIONS INVOLVED

1. The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Miscellaneous Provisions

1. Rule 17 of the Rules to the Supreme Court provides:

> ".1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceeding, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."
>
> * * *
>
> "(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court."

STATEMENT OF THE CASE

Each year during the Christmas season, the City of Birmingham displays a nativity scene as part of the City's

holiday decorations. The nativity scene is placed on the lawn of the Birmingham City Hall from approximately late November through early January of the following year. The nativity scene which has been displayed for over twenty-five (25) years, consists of traditional figures, including the Christ Child, Mary, Joseph, three shepherds and two lambs. Several trees decorated with holiday lights surround the crèche. The display was erected with public funds, lighted with electricity provided at public expense, and cleaned, stored and repaired at public expense.

The Birmingham Christmas display not only consists of the crèche but also a multitude of lights draped on City trees and public buildings throughout the central business district, natural bough wreaths displayed on public buildings, and a Santa Claus house situated across the street from the crèche. Respondents, the American Civil Liberties Union and Micki Levin, a nominal plaintiff, brought this action in the United States District Court for the Eastern District of Michigan, Southern Division, alleging that the display of the nativity scene on municipally-owned property violates the First Amendment of the Constitution. The Respondents sought an injunctive order against the City's involvement with the nativity scene and its display.

The Petitioner responded that the 1984 Supreme Court decision of *Lynch* v *Donnelly*, 465 US 668, 79 L Ed 2d 604, 104 S Ct 1355 (1984) was controlling. Petitioner argued that the *Lynch* case was very similar to the present case, although the City of Pawtucket was only involved in erecting the crèche. The display in *Lynch* was owned by a non-profit corporation and the erection of the display was on private property. However, the Supreme Court decision was not based upon the extent of the City's involvement but rather that the crèche itself did not

violate the First Amendment. Thus, government's involvement in the display did not violate the Constitution.

In this case, the Petitioner offered testimony of two Birmingham officials, the City Manager and the Director of Public Services, to illustrate that the City's purpose was to promote an expression of joy and goodwill felt by citizens in celebrating the Christmas holiday. Their testimony further reflects that the City has no official policy with regard to the purpose for the inclusion of the nativity scene. Testimony of the Plaintiff, Micki Levin, was offered to illustrate the absence of any complaints connected with this particular display.

The case was decided on cross motions for summary judgment under FRCP 56. The United States District Court for the Eastern District of Michigan held that the display of the nativity scene on public property by the City of Birmingham violated the establishment clause of the First Amendment, and the Court permanently enjoined the City from any further display of the crèche. The decision was based upon the District Court's analysis of the three-prong test set forth in *Lemon* v *Kurtzman*, 403 US 602, 612-613, 29 L Ed 2d 745, 91 S Ct 2105 (1971). The Court found that the City's crèche display had no secular purpose, had a primary effect of advancing the Christian religion, and involved government's entanglement with religion because the display might cause political divisiveness.

Petitioner presented the Sixth Circuit with the Constitutional question and argued that the District Court had erred in determining that the city's display of the crèche had violated each prong of the *Lemon* standard. The Sixth Circuit ruled, in accord with *Lynch*, that the City of Birmingham's nativity scene display served a valid secular purpose and did not involve government's excessive entanglement with religion, thus reversing the District Court's ruling on those two prongs of the *Lemon* test.

The Sixth Circuit nonetheless found a violation of the establishment clause, and the effect prong of the *Lemon* test, by its ruling that a nativity scene erected on public property without nonreligious trappings, and without their perceived minimizing or diluting influence, constitutes government's symbolic affirmation of Christianity.

The Sixth Circuit expressly recognized that its decision was in conflict with the Second Circuit decision in *McCreary* v *Stone*, 739 F2d 716 (2d Cir 1984), *affirmed by an equally divided court sub nom. Board of Trustees of Village of Scarsdale* v *McCreary*, 417 US __, 85 L Ed 2d 63, 105 S Ct 1859, where it observed (791 F2d 1566):

> "To the extent that the *McCreary* court's decision may be read to hold that a city may place a crèche unaccompanied by any nonreligious symbols of the holiday in a prominent position on the lawn of the official headquarters building of the municipal government, we disagree."

REASONS FOR GRANTING THE WRIT

I.

THE SEASONAL DISPLAY OF A CHRISTMAS NATIVITY SCENE BY THE CITY OF BIRMINGHAM ON PUBLIC PROPERTY, UNACCOMPANIED BY OTHER SECULAR DECORATIONS, DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

1. This case presents the question whether the City of Birmingham's temporary display of a nativity scene during the Christmas Holiday season violates the establishment clause of the First Amendment. Recently, this Court in *Lynch* v *Donnelly, supra,* held that a Christmas crèche display withstood Constitutional challenge because it constitutes an integral part of the season and

secular celebration associated with the national holiday. The courts below have focused their attention upon the details of the crèche's surroundings and ignored this Court's intent to uphold the legality of Christmas nativity scene displays "found in hundreds of towns or cities across the nation." 465 US 671. The Supreme Court in *Lynch* stressed that the establishment clause inquiry "must be on the crèche in the context of the Christmas season." 465 US 679. The Court also warned (465 US 680):

> "Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause."

2. In the Sixth Circuit opinion in this case, the Court of Appeals rejected the findings of the District Court on the purpose and entanglement factors concluding that, like the City of Pawtucket in *Lynch,* the Petitioner had a valid secular purpose in displaying the crèche; and there was no basis in this case for any finding of entanglement. 791 F2d 1565-1566. However, the Sixth Circuit majority affirmed the District Court's finding on the effect prong of *Lemon,* concluding that the "direct and immediate effect of such a display is endorsement of a particular religion." 791 F2d 1567. The heart of the Sixth Circuit majority's reasoning in support of this conclusion is revealed in the following statement (791 F2d 1566):

> "The crèche has no other significance or message — it is a purely religious symbol. When surrounded by a multitude of secular symbols of Christmas, a nativity scene may do no more than remind an observer that the holiday has a religious origin. But when the nonreligious trappings — accretions of the centuries — are stripped away, there remains only the universally

recognized symbol for the central affirmation of a single religion — Christianity."

In his well-reasoned dissent, Judge Nelson agreed with the Second Circuit's decision in *McCreary* v *Stone, supra,* that *Lynch* was not decided on the basis of the physical context of the Pawtucket display; and the Sixth Circuit majority was establishing a "St Nicholas too" test by which a city can properly display a nativity scene "if it throws in a sleigh full of toys and a Santa Claus, too." 791 F2d 1569.

The error of the Sixth Circuit's decision is that it fell into the trap *Lynch* warned against: "Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the establishment clause." 465 US 680. As this Court said in *Lynch,* and as was correctly followed by the Second Circuit in *McCreary, supra,* the proper context to view a nativity scene display is the Christmas Holiday season, and when so viewed such a display does not have the primary, principal or direct effect of advancing religion. 465 US 680; concurring opinion of O'Connor, J, 465 US 692.

The Sixth Circuit's majority opinion in this case is thus in direct conflict with this Court's decision in *Lynch,* and with the Second Circuit's *McCreary* decision.

3. The majority opinion of the Sixth Circuit is not buttressed by this Court's decision in *Grand Rapids School District* v *Ball,* 473 US __, 87 L Ed 2d 267, 105 S Ct 3216 (1985). In that case the Court examined supplementary instruction programs for students in nonpublic schools financed by the public school system and taught in classrooms in the nonpublic schools by teachers hired and paid by the public school system. The Court found that the program violated the primary effect prong of *Lemon* for three reasons: the potential that teachers may

subtly or overtly indoctrinate students in religious tenets; the programs threatened to convey the message of a symbolic union of government and religion in one sectarian enterprise; and the programs were a direct subsidy and direct benefit to nonpublic schools. 105 S Ct 3230.

On the symbolic impact issue Justice Brennan pointed out that such an inquiry is most relevant "when many of the citizens perceiving the governmental message are children in their formative years." 105 S Ct 3226. Justice Brennan observed that this particular concern for students had been reflected in the distinction between opening prayers at legislative sessions approved in *Marsh* v *Chambers*, 463 US 783, 77 L Ed 2d 1019, 103 S Ct 3330 (1983), and prayers conducted in the classroom at the opening of school day struck down in *Abington School District* v *Schempp*, 374 US 203, 10 L Ed 2d 844, 83 S Ct 1560 (1963), and in *Engel* v *Vitale*, 370 US 421, 8 L Ed 2d 601, 82 S Ct 1261 (1962). *Id*, at fn 9.

To the extent the *Grand Rapids School District* case involved concern about the "message" conveyed by the school programs involved in that case, it is clear that the Court was focusing on the perception resulting from a joint enterprise between the public school system and the sectarian schools when it said, "This effect — the symbolic union of government and religion in one sectarian enterprise — is an impermissible effect under the establishment clause." 105 S Ct 3227.

4. A "symbolic union" and the message it conveyed were also involved in *Larkin* v *Grendel's Den, Inc.*, 459 US 116, 74 L Ed 2d 297, 103 S Ct 505 (1983), where a state statute delegated power to churches to veto liquor license applications for location within 500 feet of any church. That delegation of legislative power was found to violate the primary effect prong of *Lemon* because it

was standardless, and there was no way to guarantee that the power would be used for exclusively secular and neutral purposes. 459 US 125. The Court also found (459 US 125-126):

> "In addition, the mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred."

It is important to note that the statute was also found to violate the secular purpose and entanglement prongs of *Lemon*.

5. The "symbolic union" message issue is not present in this case. We do not have here a "symbolic union" consisting of a joint enterprise between government and sectarian authorities such as was involved in the *Grand Rapids School District* case, nor an overt flow of government power from the state to church bodies as was involved in *Larkin* v *Grendel's Den*. Furthermore, this Court in *Lynch* held that a crèche display, a passive reminder of the historical origins of the Holiday, does not convey an endorsement of religion, and any benefit to religion is indirect, remote and incidental. 465 US 685.

The Sixth Circuit was therefore in error when it concluded that the nativity scene in this case had the primary effect of conveying an endorsement of religion.

II.

A VIOLATION OF THE ESTABLISHMENT CLAUSE MAY NOT BE BASED SOLELY ON A FINDING OF A SYMBOLIC MESSAGE OF ENDORSEMENT OF RELIGION.

1. In accordance with the majority opinion of the Sixth Circuit, the facts of this case encompass govern-

ment action which has a valid secular purpose, does not involve those types of direct aid or benefit to religion which the Supreme Court has found to have the primary effect of advancing religion, and does not result in excessive entanglement with religion. Yet the Sixth Circuit finds that the challenged action, the annual display of a nativity scene on municipal property during the Christmas Holiday season, violates the establishment clause and the primary effect prong of *Lemon*, because it conveys a message of endorsement of religion.

Petitioner contends such a finding is impossible under *Lemon* and under the Supreme Court cases construing the establishment clause. The Sixth Circuit majority decision elevates symbolism to a new and independent fourth prong under *Lemon*; raises the specter of a wholly subjective standard which is the antithesis of appropriate rule-making in this important area of the law; and would have the result of invalidating all of the benefits and endorsements which the Supreme Court has previously ruled are not violative of the establishment clause.

2. Would not this amorphous message of endorsement be found in the expenditure of public money for textbooks supplied to students attending church-sponsored schools approved in *Board of Education* v *Allen*, 392 US 236, 20 L Ed 2d 1060, 88 S Ct 1923 (1968); in the expenditure of public funds for transportation of students to sectarian schools approved in *Everson* v *Board of Education*, 330 US 1, 91 L Ed 711, 67 S Ct 504 (1947); in the federal grants for college buildings of sectarian institutions combining secular and religious education approved in *Tilton* v *Richardson*, 403 US 672, 29 L Ed 2d 790, 91 S Ct 2091 (1971); in the noncategorical grants to church-sponsored colleges and universities approved in *Roemer* v *Board of Public Works*, 426 US 736, 49 L Ed 2d 179, 96 S Ct 2337 (1976); in the tax exemption for church

properties approved in *Walz* v *Tax Commission*, 397 US 664, 25 L Ed 2d 697, 90 S Ct 1409 (1970); in the Sunday Closing Laws upheld in *McGowan* v *Maryland*, 336 US 420, 6 L Ed 2d 393, 81 S Ct 1101 (1961); in the release time programs approved in *Zorach* v *Clauson*, 343 US 306, 96 L Ed 954, 72 S Ct 679 (1952); and in the legislative prayers approved in *Marsh, supra*? If all that is needed to show a violation of establishment the clause is the federal judiciary's subjective perception of whether challenged action is a symbolic approval of religion, then surely all of the foregoing benefits and endorsements would be violative of the establishment clause; and no activity or law affecting religion would ever be approved. But such a result cannot comport with the recognized relationship between church and state: ". . . ; [the Constitution] affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch* v *Donnelly, supra*, 465 US at 673.

3. *Hunt* v *McNair*, 413 US 734, 37 L Ed 2d 923, 93 S Ct 2868 (1973) gave meaning to the primary effect prong of *Lemon* where the Court said (413 US 743):

> "Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting."

In both of the recent cases discussing the evolving concept of "symbolic benefit," the facts show that the *Hunt* elements of primary effect were clearly present. In *Larkin* v *Grendel's Den, supra*, there was a standardless statutory delegation of legislative power to churches, a direct aid or benefit to religion. The Court also found

violations of the purpose and entanglement prongs of *Lemon* in that case. In *Grand Rapids School District* v *Ball, supra,* the Court found a direct subsidy to religion; and a danger that teachers paid with public funds might inculcate particular religious beliefs to students in the teaching programs.

4. As pointed out above, both *Larkin* and *Grand Rapids School District* involved a joint enterprise between church and state as the "symbolic union" found to advance religion. But in neither case did the Court suggest or hint that an establishment clause violation can be premised on a symbolic message of endorsement where there are none of the traditional aid or benefit elements, and there is no joint enterprise or union or some arrangement between church and state. In both of those cases, the "message" was the outgrowth of the joint enterprise between church and state, and had no independent basis emanating from an actual endorsement of religion. In this case there was no actual endorsement of religion; and there cannot be a symbolic endorsement of religion in the absence of some joint undertaking between church and state. Additionally, the *Lynch* concurrence held that the message of a crèche display is no more insidious than the exhibition of religious paintings in museums around the country. 465 US at 676; concurring opinion of O'Connor, J, 465 US at 692.

5. The Sixth Circuit decision in this case is not only reversible error under the holdings of this Court in *Lynch;* it is also error because its sole basis for determining the challenged action is a violation of the establishment clause, is a finding of a symbolic message of endorsement of religion. As a matter of law, such a finding, without more, cannot constitute a violation of the establishment clause.

III.

THE DECISION OF THE SIXTH CIRCUIT IN THIS CASE PRESENTS A CONFLICT WITH *LYNCH* v *DONNELLY* AND WITH THE SECOND CIRCUIT DECISION OF *McCREARY* v *STONE*.

1. *McCreary* v *Stone, supra,* held that *Lynch* was not decided on the basis of the display context within which the nativity scene was situated. 739 F2d 729. The Second Circuit also held, in accordance with *Lynch,* that government's involvement in the display of a nativity scene during the Christmas Holiday season does not have the primary effect of advancement of religion. 739 F2d 727.

2. The Sixth Circuit majority opinion is directly at odds with *McCreary*. The Sixth Circuit holds that the display context is crucial; and that without the other Christmas paraphernalia about, a nativity scene has the primary effect of advancing religion. This case also presents a conflict with the pronouncements of this Court in *Lynch*. This case therefore involves the conflict provisions of both Supreme Court Rules 17.1(a) and 17.1(c).

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

BEIER, HOWLETT, HAYWARD, McCANN, JONES, KINGSEPP & SHEA

By: /s/ JON H. KINGSEPP (P15982)*

Attorneys for Petitioner
74 W. Long Lake Road, Suite 1
Bloomfield Hills, Michigan 48013
(313) 645-9400

* *Counsel of Record*

DATED: September 5, 1986

APPENDICES

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APPENDIX A

OPINION

(United States Court of Appeals — Sixth Circuit)

(Argued February 27, 1986; Decided June 11, 1986)

(AMERICAN CIVIL LIBERTIES UNION, and Micki Levin, Plaintiffs-Appellees, v. CITY OF BIRMINGHAM, Defendant-Appellant — No. 84-1637)

Suit was brought challenging placement and maintenance of nativity scene by city on lawn of city hall during Christmas season. The United States District Court for the Eastern District of Michigan, Anna Diggs Taylor, J., 588 F.Supp. 1337, granted plaintiff's motion for summary judgment and issued injunction, and city appealed. The Court of Appeals, Lively, Chief Judge, held that display of crèche, unaccompanied by any nonreligious symbols of the holiday, in a prominent position on the lawn of city hall violated the establishment clause of the First Amendment.

Affirmed.

David A. Nelson, Circuit Judge, filed a dissenting opinion.

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1. Constitutional Law ☞84(1)

Statute or government practice that has the effect of impeding individuals from making free choices in religious matters, by appearing either to embrace or reject a particular religion, violates the establishment clause of the First Amendment. U.S.C.A. Const.Amend. 1.

2. Constitutional Law ☞84.5(11)

Christmastime display of city-owned crèche on the front lawn of city hall was not lacking in secular purpose though it may have been motivated in part by religious purpose, but nonetheless had effect of advancing religion, thus violating establishment clause of First Amendment, where the

display was not accompanied by secular symbols of Christmas; disagreeing with McCreary v. Stone, 739 F.2d 716 (2d Cir.). U.S.C.A. Const. Amend. 1.

Jon H. Kingsepp, Beier, Howlett, Hayward, McConnell, McCann, Jones, Kingsepp, Shea, Charles J. Porter (argued), Bloomfield Hills, Mich., for defendant-appellant; Daniel J. Popeo, George Smith, Washington, D.C., amicus curiæ (Washington Legal Foundation); James Schuster, Robert A. Sedler (argued), Detroit, Mich., for plaintiffs-appellees.

Before LIVELY, Chief Judge, and MERRITT and NELSON, Circuit Judges.

LIVELY, Chief Judge.

This First Amendment case involves the Christmas-time display of a city-owned crèche, or nativity scene, on the front lawn of the city hall of Birmingham, Michigan. Much of the argument before the district court concerned the application to this case of the Supreme Court's decision in *Lynch* v. *Donnelly*, 465 U.S. 668, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984). In *Lynch* the Court found no First Amendment violation in Pawtucket, Rhode Island's inclusion of a city-owned crèche in a seasonal display containing many familiar Christmas symbols such as decorated trees, candy striped poles and a Santa Claus house and reindeer-powered sleigh. The district court distinguished *Lynch* and held that the display violated the Establishment Clause. *American Civil Liberties Union* v. *City of Birmingham*, 588 F.Supp. 1337 (E.D.Mich. 1984).

I.

The facts are not in dispute. The district court stated the admitted facts as follows:

1. Annually, during the Christmas season, from approximately late November through early January of the following year, the City of Birmingham displays a nativity scene on the lawn of the Birmingham City Hall. The nativity scene is comprised of figurines depicting the Christ Child, the Mother Mary, Joseph, three costumed shepherds, and several lambs. Absolutely nothing else is included in the display.

2. In all matters herein, the defendant city was acting as a governmental unit under color of state law, custom or usage, by and through its functionaries, employees, agents or elected officials.

3. The nativity scene was displayed on public property in front of Birmingham City Hall, a place open to the general public. When not displayed on public property, it was stored on public property. The figures in the nativity scene were built at public expense, and the electricity used in connection with the display was furnished out of public funds. The nativity scene was cleaned, restored, repaired and maintained at public expense, and was dismantled and conveyed to storage by public employees at public expense.

558 F.Supp. 1338. The district court described the Christmas display challenged in *Lynch* and discussed the Supreme Court's holding as follows:

> The Pawtucket display was situated in a park owned by a non-profit organization and was located in the heart of the Pawtucket shopping district. It consisted of many of the figures and

> decorations traditionally associated with the winter holiday season, including a Santa Clause [sic] house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing a clown, an elephant, and a teddy bear, a "SEASONS GREETINGS" banner and hundreds of lights, as well as the nativity scene. The court in *Lynch* determined that the display was sponsored by the city of Pawtucket in order to celebrate the holiday season and to depict the origins of that holiday, and that there were legitimate secular purposes for the display. There being secular purposes for the display, the court found that there was no attempt by the defendant city to express any kind of subtle government advocacy of a particular religious message.
>
> Although the *Lynch* opinion is replete with references to the significant role that religion has played in the development of our nation, it does not, either on its face or in any implicit proclamation, hold that a nativity scene standing alone, or that any other single religious symbol or group of such symbols erected on public property with public funds, complies with the requirements of the separation of church and state required by our Constitution.

Id. at 1338-39.

As the Supreme Court did in *Lynch*, the district court in the present case applied the three-part test of *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971), to determine whether a challenged practice is permitted:

> First, the practice must have a secular legislative purpose; second, its principal or primary effect

> must be one that neither advances nor inhibits religion; finally, it must not foster an excessive government entanglement with religion.

Id. at 1339.

The district court concluded that the Birmingham crèche display failed all three prongs of the *Lemon* test. Emphasizing the absence of any nonreligious Christmas symbols in the Birmingham setting, the district court found no secular purpose for the display. In addition, the district court found it clear that the primary effect of the display "must be to advance, affirm, approve and otherwise validate the Christian religion, in that implicit government support of the religion represented by the sacred figures must be presumed by onlookers." *Id.* The district court found that the display failed the third *Lemon* test — excessive entanglement — because its purely religious character "might cause political divisiveness." *Id.*

II.

This appeal was well briefed by the parties and amici, and well argued. There is a temptation for the court to write too much in a case such as this, since the Establishment Clause has produced a confusing body of law, which is sometimes difficult to apply. Despite the absolute language employed by the authors of the First Amendment and Thomas Jefferson's metaphorical reference to the "wall" between church and state, the Supreme Court has approved many "accommodations" to the religious heritage of our nation.

[1] The particular condition that the Founding Fathers sought to prohibit by inclusion of the Establishment Clause in the First Amendment was the often tyrannical alliance between European governments and

their official state religions. There was to be no established national church in the United States. However, the Establishment Clause was concerned with a larger evil, most often embodied in the establishment of official churches. The larger evil is government involvement in individual religious decisions. Every person must be free to make decisions in religious matters without any compulsion or interference by government. A statute or government practice that has the effect of impeding individuals from making free choices in religious matters by appearing either to embrace or reject a particular religion violates the Establishment Clause. This analysis seems consistent with that of Justice O'Connor, who concurred separately in *Lynch*, a 5 to 4 decision. Justice O'Connor stated the central issue in *Lynch* as whether the city endorsed Christianity by its display of the crèche. After eliminating the issue of excessive entanglement, she approached the remaining two prongs of the *Lemon* test as follows:

> The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.

Lynch, 465 U.S. at 690, 104 S.Ct. at 1368.

A majority of the Supreme Court appears to have adopted this approach. In *Grand Rapids School District* v. *Ball*, __ U.S. __, 105 S.Ct. 3216, 3226, 87 L.Ed.2d 267 (1985), Justice Brennan wrote for the Court:

> Government promotes religion as effectively when it fosters a close identification of its powers

> and responsibilities with those of any — or all — religious denominations as when it attempts to inculcate specific religious doctrines. If this identification conveys a message of government endorsement or disapproval of religion, a core purpose of the Establishment Clause is violated. See *Lynch* v. *Donnelly*, 465 U.S. 668, __, 104 S.Ct. 1355, __, 79 L.Ed.2d 604 (1984) (O'CONNOR, J., concurring).

(Citation omitted).

We will attempt the same approach in the present case.

III.

In support of the district court's holding, the plaintiffs point to differences between the facts in *Lynch* and those disclosed by the present record. In his opinion for the *Lynch* majority Chief Justice Burger described the Pawtucket Christmas display:

> Each year, in cooperation with the downtown retail merchants' association, the city of Pawtucket, R.I., erects a Christmas display as part of its observance of the Christmas holiday season. The display is situated in a park owned by a nonprofit organization and located in the heart of the shopping district. The display is essentially like those to be found in hundreds of towns or cities across the Nation — often on public grounds — during the Christmas season. The Pawtucket display comprises many of the figures and decorations traditionally associated with Christmas, including, among other things, a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout

> figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that reads "SEASONS GREETINGS," and the crèche at issue here. All components of this display are owned by the city.
>
> The crèche, which has been included in the display for 40 or more years, consists of the traditional figures, including the Infant Jesus, Mary and Joseph, angels, shepherds, kings and animals, all ranging in height from 5" to 5'. In 1973, when the present crèche was acquired, it cost the city $1,365; it now is valued at $200. The erection and dismantling of the crèche costs the city about $20 per year; nominal expenses are incurred in lighting the crèche. No money has been expended on its maintenance for the past 10 years.

465 U.S. at 671, 104 S.Ct. at 1358. The plaintiffs emphasize the repeated references in *Lynch* to the "inclusion" of the nativity scene within the larger display in contrast to the "unadorned" crèche on the city hall lawn in the present case. They maintain that the primary effect of a nativity scene standing alone in a prominent position on city property is to send an unmistakable signal to observers that Christianity is officially endorsed by the city.

The city responds that the absence of other Christmas paraphernalia in the setting of the crèche is unimportant.[1] It was inclusion of the crèche *in the Christmas celebration* that was approved in *Lynch*, not its inclusion in a display containing nonreligious Christmas symbols, the city asserts. The city concedes that the crèche display

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[1] The only other city decorations consisted of natural bough wreaths and approximately 1000 strings of lights placed on city trees and buildings in the business district of Birmingham.

"advances religion in a sense," but argues that this is merely an indirect and incidental effect of its inclusion in the observance of the national holiday. The holiday has a religious origin, which was recognized when Congress set aside that day for official observance. The inclusion of the symbol of this origin, according to the city, does nothing more to advance Christianity than the original decision to make Christmas a national holiday.

The city relies heavily on *McCreary* v. *Stone*, 739 F.2d 716 (2d Cir. 1984), *affirmed by an equally divided court sub nom. Board of Trustees of Village of Scarsdale* v. *McCreary*, __ U.S. __, 105 S.Ct. 1859, 85 L.Ed.2d 63 (1985), a decision which the district court here declined to follow. In *McCreary*, the Village of Scarsdale, New York had permitted a civic group to place a crèche in a city-owned park in the center of the business district for two weeks during the Christmas holiday season. The Scarsdale crèche was placed on city-owned land, while the Pawtucket crèche was displayed in a park owned by a private organization. Also, the Scarsdale crèche was "unadorned," that is, it stood alone rather than as part of a larger display including secular symbols of the holiday. The Scarsdale display also contained a small disclaimer sign that read, "This crèche has been erected and maintained solely by the Scarsdale Crèche Committee, a private organization." When objections were voiced to this practice the city denied an application to display the crèche during the 1983 holiday season. The district court upheld the city's action on First Amendment grounds, but the court of appeals reversed, finding that permitting the display did not have the direct and immediate effect of advancing religion. In *McCreary*, the Second Circuit found the factual differences between the Scarsdale case and *Lynch* unimportant.

The plaintiffs respond to this argument by pointing out that *McCreary* involved the denial of an application to place a crèche in a park that was a recognized public forum, implicating freedom of speech as well as of worship. Further, while reversing, the court of appeals remanded to the district court to enter an order providing a larger, more visible sign, and concluded:

> We believe that a proper disclaimer message — especially when coupled with the presence of the valid secular purpose, the lack of excessive entanglement, the Village's general grants of access to its public properties and the publicity the Village's official views have received in Scarsdale — will ensure that no reasonable person will draw an inference that the Village supports any church, faith or religion associated with the display of a crèche during the Christmas season at Boniface Circle.

739 F.2d at 728. The plaintiffs argue that the public forum issue was critical to the decision in *McCreary* and that the result might well have been different without this factor and if there had been no disclaimer of city involvement.

IV.

[2] The district court erred in concluding that the display in Birmingham had no secular purpose and that it fostered excessive government entanglement with religion.

A.

The Supreme Court made clear in *Lynch* that a totally secular purpose is not required. The City of Pawtucket was joining in the celebration of a national holiday and inclusion of the crèche in the display served only to

depict the historical origins of the celebration. 465 U.S. at 681, 104 S.Ct. at 1363. The same reasoning applies to the display in the present case. The City of Birmingham concedes that the nativity scene has religious significance. However, the city manager testified that the purpose of the display is "to be in keeping with the expression of the total community toward that period of the year." To him the crèche was "just one element, an expression of joy, goodwill, that people have for one another in a community sense."

A statute or practice that is motivated in part by a religious purpose may satisfy the first *Lemon* criterion so long as it is not motivated entirely by a purpose to advance religion. *Wallace* v. *Jaffree*, ___ U.S. ___, 105 S.Ct. 2479, 2490, 86 L.Ed.2d 29 (1985). Given the holding in *Lynch* we cannot find that inclusion of the crèche in the celebration of Christmas as a national holiday was devoid of all secular purpose. The record does not support a finding that the "actual purpose" of displaying the crèche was to endorse religion. *Lynch*, 465 U.S. at 690, 104 S.Ct. at 1367. (O'Connor, J., concurring).

B.

In *Lynch* the Supreme Court also made it clear that in the absence of excessive administrative entanglement fostered by the challenged government action, political divisiveness alone cannot render otherwise permissible official conduct invalid. Other than the present lawsuit, apparently no complaints have been registered about the Birmingham crèche. Since the city owned the crèche and no church or other religious entity was involved in the annual display, there was no evidence of entanglement. The district court erred as a matter of law in finding that the city failed to satisfy the third prong of the *Lemon* test.

V.

Our most difficult problem is to determine whether the effect of the crèche in the Birmingham setting was to endorse Christianity. The fact that the display "advances religion in a sense" is not controlling. *Lynch*, 465 U.S. at 683, 104 S.Ct. at 1364. More pertinent is the question whether any benefit to religion from the display is direct and immediate, or only "indirect, remote, and incidental." *Id.*

In *Lynch* the Supreme Court stated that the district court erred in "focusing almost exclusively on the crèche," and cautioned that the display must be viewed "in the proper context of the Christmas Holiday season." 465 U.S. at 680, 104 S.Ct. at 1362. Given that the City of Birmingham had a secular purpose for displaying the crèche — to promote a feeling of joy and goodwill — our remaining inquiry is whether the display did in fact convey a message of endorsement of Christianity.

The Birmingham city hall display called attention to a single aspect of the Christmas holiday — its religious origin. A crèche standing alone without any of the non-religious symbols of Christmas affirms the most fundamental of Christian beliefs — that the birth of Jesus was not just another historical event. Rather, to the believer Christ's birth was an act of divine intervention in human affairs that set this birth apart from all others. The same witness who described the city's secular purpose stated that the crèche "is consistent with the recognition of the Christmas Day, Holiday that's granted and the significance of that date as being the birth of the Christ Child." He also testified, "There are Nativity Scenes in every church around"; "[t]he Nativity Scene, whether it be at City Hall or any other place does have a religious significance to me."

This reaction to the crèche is normal, and presumably universal. The crèche has no other significance or message — it is a purely religious symbol. When surrounded by a multitude of secular symbols of Christmas, a nativity scene may do no more than remind an observer that the holiday has a religious origin. But when the nonreligious trappings — accretions of the centuries — are stripped away, there remains only the universally recognized symbol for the central affirmation of a single religion — Christianity. To the extent that the *McCreary* court's decision may be read to hold that a city may place a crèche unaccompanied by any nonreligious symbols of the holiday in a prominent position on the lawn of the official headquarters building of the municipal government, we disagree.

Since the majority does not need its protections, the Bill of Rights was adopted for the benefit and protection of minorities. From the beginning, Christians have constituted a majority in America and non-Christians are acutely aware of this fact. Their assurance of equality before the law, despite their religious nonconformance, derives from the guarantees of the First Amendment. It is difficult to believe that the city's practice of displaying an unadorned crèche on the city hall lawn would not convey to a non-Christian a message that the city endorses Christianity. The crèche, thus displayed,

> sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.

Lynch, 465 U.S. at 688, 104 S.Ct. at 1366 (O'Connor, J., concurring).

We have not overlooked the admonition in *Lynch* to view the crèche "in the proper context of the Christmas

Holiday season." In *Lynch* the city's observance of the season consisted of the use of a wide variety of secular symbols of the season. Justice O'Connor noted, "The crèche is a traditional symbol of the holiday that is very commonly displayed *along with purely secular symbols*, as it was in Pawtucket." 465 U.S. at 692, 104 S.Ct. at 1369 (emphasis added). Set in the midst of such a display the nativity scene might be held to do no more than remind an observer that this season of feasting and gift-giving has a religious origin. Thus, the Court wrote, "The crèche *in the display* depicts the historical origins of this traditional event long recognized as a National Holiday." *Lynch*, 465 U.S. at 680, 104 S.Ct. at 1362 (emphasis added). In our opinion, the city-owned and city-sponsored nativity scene sends quite a different message when it stands alone as the only clearly identifiable symbol chosen by the city to mark its contribution to the celebration. The direct and immediate effect of such a display is endorsement of a particular religion.

The judgment of the district court is affirmed.

DAVID A. NELSON, Circuit Judge, dissenting.

If it is an "establishment of religion" for a city to display an unadorned nativity scene at Christmas, I would have thought it no less an establishment of religion for the City to display a nativity scene adorned with a panoply of other Christmas symbols, such as lighted Christmas trees, reindeer, and, as the Christmas poem puts it, "a sleigh full of toys — and St. Nicholas, too." The Supreme Court having told us that a nativity scene with other Christmas symbols is constitutional, I am therefore troubled by the conclusion that a nativity scene without them is not.

Were we writing on a clean slate, this case might have given us less difficulty than it has. We would then have looked at the language of the First Amendment ("Congress shall make no law respecting an establishment of religion") and decided whether or not the City of Birmingham is "Congress." Answering that question in the negative, we would have turned, presumably, to the Fourteenth Amendment and considered whether anything in its text[1] or in the history of its adoption suggests an intent to empower the federal judiciary, in the absence of "appropriate legislation" enacted by Congress, to tell municipalities how they may decorate their buildings and grounds for Christmas. I am not sure that we could have detected such an intent, as an original proposition.

Our slate has already been written on rather extensively, however, and although it may bear the signs of a few erasures and may have picked up a certain amount of chalk dust, it contains some very plain instructions on how we are to approach our present assignment. We are to take it as given, for example, that the Establishment Clause of the First Amendment has been made binding on the states through the Fourteenth Amendment; that the Fourteenth Amendment (unlike the Eleventh) uses

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[1] The only sections of the Fourteenth Amendment that could be considered relevant are sections 1 and 5. Section 1 provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 5 provides:

> "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

the word "State" to include cities, towns and other political subdivisions; and that the prohibition against legislation respecting an establishment of religion extends to executive action as well as legislative.

All this, I think, the decisions of the Supreme Court make clear. What is not so clear, in the context of this case and in the absence of explicit guidance from Congress, is how the Supreme Court would have us construe the words "an establishment of religion."

Where we are called upon to decide a constitutional question that has not yet been squarely addressed by the Supreme Court, we need not — and I think we should not — close our minds to the history of our institutions, to the customs and traditions of our people, or (borrowing a phrase from Lord Coke) to our sense of "common right and resoun." Neither should we close our minds to the logic that informs those Supreme Court decisions which most closely concern our question, even if they do not answer it. Open our minds as we will, however, we are likely to find unanimity of opinion elusive where the subject is the constitutional relationship between church and state. I express my own thoughts on this subject with some diffidence, knowing that I am in territory where the boundary between orthodoxy and heresy, shifted more than once in the past, is probably not firmly fixed yet.

The phrase "establishment of religion" may have been something of a chameleon term even in the days of the Founders, but few people then, I think, would have disagreed over the common core of meaning behind it. The clause in which the phrase occurs "forbids an established church of anything approaching it," *Lynch* v. *Donnelly*, 465 U.S. 668, 673, 104 S.Ct. 1355, 1359, 79 L.Ed.2d

604 (1984),[2] and the late 18th Century was not unfamiliar with state-established churches of one kind or another. South Carolina provides a good example. The constitution adopted by that state in 1778, some thirteen years before the adoption of the First Amendment, "provided that *only Protestants* could sit in the two houses of the state legislature," and it "put the point as forthrightly as anyone could ask: 'The Christian Protestant religion shall be deemed, and is hereby constituted and declared to be, the established religion of this State.'" William Lee Miller, *The First Liberty: Religion and the American Republic* (1986), p. 19. Ezra Stiles, a Congregational minister in Rhode Island, has been quoted as stating (in 1761) "that the laws of New Hampshire and Massachusetts 'as fully established congregationalism . . . as the acts of parlia-

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[2] *Cf.* this passage from the description, in the Annals of Congress, of the discussion in the House of Representatives of the Report of the Select Committee that considered the proposed Bill of Rights presented by James Madison:

> "Mr. Madison said, he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." (Quoted in Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* (1986), p. 200.)

"In actuality," a modern scholar tells us, "the founders generally regarded establishment as a direct support of religion by government — the kind many of them had experienced in the colonial past and still had before them in several of the states." A. James Reichley, *Religion in American Public Life* (1985), p. 158.

As a matter of law, the First Amendment has been construed to be "more than a pledge that no single religion will be designated as a state religion," and "more than a mere injunction that governmental programs discriminating among religions are unconstitutional." *Grand Rapids School District* v. *Ball*, 473 U.S. __, __, 105 S.Ct. 3216, 3221, 87 L.Ed.2d 267, 275 (1985). As a matter of history, however, "[t]he evil to be aimed at . . . appears to have been the establishment of a national church, and perhaps the preference of one religious sect over another . . . ." *Wallace* v. *Jaffree*, 472 U.S. __, __, 105 S.Ct. 2479, 2513, 86 L.Ed.2d 29, 71 (1985) (Rehnquist, J., dissenting.)

ment . . . establish episcopacy in South Britain.'" Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* (1986), p. 120. "Establishment of religion," as the term was used in the days of the Founders, connoted such things as the payment of clerical salaries by the state, the governmental prescription of articles of faith, the imposition of religious tests for office, and the official endorsement of particular forms of worship. The Founders might well have been surprised to learn some of the connotations the term has taken on in recent years.

Does the conduct of the City of Birmingham in erecting a manger scene on city property during the Christmas season come impermissibly close to the making of a "law respecting an establishment of religion" within the current meaning of those words? I do not read *Lynch* v. *Donnelly* as teaching that it does, but this court has drawn from that case a different lesson. The lesson comes down to this: a city is free to display such a scene at Christmas if it is balanced by symbols which, although they may also be associated with Christmas, are considered secular in origin. If enough such symbols are displayed, the manger scene will pass constitutional muster. It may be convenient to think of this as a "St. Nicholas too" test — a city can get by with displaying a crèche if it throws in a sleigh full of toys and a Santa Claus, too.

The application of such a test may prove troublesome in practice. Will a mere Santa Claus suffice, or must there also be a Mrs. Claus? Are reindeer needed? If so, will one do or must there be a full complement of eight? Or is it now nine? Where in the works of Story, Cooley or Tribe are we to find answers to constitutional questions such as these?

The point I am trying to make is a serious one, of course. The holiday we celebrate as Christmas began as a pagan festival millennia before the birth of Christ, and "some people have thought that the Christians invented Christmas to compete against the pagan celebrations of December twenty-fifth." Earl W. Count, *4000 Years of Christmas* (1948), pp. 18 & 27. The symbolism of Christmas in the 20th Century A.D. continues to incorporate many pagan elements, and Christmas would hardly be Christmas, for most Americans, without them. But I question whether it is appropriate for the federal courts to tell the towns and villages of America how much paganism they need to put in their Christmas decorations, and I am reluctant to attribute to the Supreme Court an intent to point us in that direction by implication.

I am strengthened in my conclusion that *Lynch* does not require us to apply a "St. Nicholas too" test by the fact that the Court of Appeals for the Second Circuit (Mansfield, Pierce and Pratt, JJ.,) has specifically rejected the assertion that *Lynch* adopts such a test. In explaining why that reading of *Lynch* is "erroneous," the Second Circuit said:

> "The Supreme Court did not decide the Pawtucket case based upon the physical context within which the display of the crèche was situated; rather, the Court consistently referred to 'the crèche in the context of the Christmas season,' *id.* 104 S.Ct. at 1362, or the 'Christmas Holiday season,' *id.* After determining that the proper context for analysis was the Christmas season, the Court noted:
>
> > To forbid the use of this one passive symbol — the crèche — *at the very time people are taking note of the season* with Christmas hymns

> and carols in public schools and other public places, and while the Congress and Legislatures open sessions with prayers by paid chaplains would be a stilted overreaction contrary to our history and to our holdings. If the presence of the crèche in this display violates the Establishment Clause, a host of other forms of taking official note of Christmas, and of our religious heritage, are equally offensive to the Constitution.
>
> *Lynch*, 104 S.Ct. at 1365 (emphasis added). Thus, the Village's display-context argument fails."

McCreary v. *Stone*, 739 F.2d 716, 729 (2d Cir. 1984), *aff'd. by an equally divided court sub nom. Board of Trustees of the Village of Scarsdale* v. *McCreary*, 471 U.S. __, 105 S.Ct. 1859, 85 L.Ed.2d 63 (1985).

As a practical matter, to be sure, a "St. Nicholas too" approach may not be a bad compromise of the conflict between the view that the Establishment Clause bars all religious symbols on government property[3] and the view — a more traditional view, it is fair to say — that the First and Fourteenth Amendments were intended to do no such thing. The conflict is obviously a sharp one.

Whatever the actual intent of the people who originated Birmingham's nativity scene more than 30 years ago, and whatever their Christological views may actually have been, the plaintiff in this case views the display as "constituting an official endorsement of the Christian religion and of its principal tenet, the divinity of Jesus." The evil of such an "endorsement," she argues in terms taken from Justice O'Connor's concurring

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[3] The individual plaintiff in this case testified, in effect, that she thought a "strict" interpretation of the First Amendment would require the removal of every cross from Arlington National Cemetery.

opinion in *Lynch*, is that it sends "a message to non-Christians that they are outsiders and not full members of the Birmingham political community."

But is this really Birmingham's message? The record before us is not particularly illuminating,[4] nor should we expect it to be: the question is "in large part a legal question to be answered on the basis of judicial interpretation of social facts." *Lynch* v. *Donnelly*, 465 U.S. at 694, 104 S.Ct. at 1369 (O'Connor, J., concurring.) I am not persuaded that the social facts of our time justify the conclusion that the City of Birmingham can reasonably be said to have endorsed Christianity or to have sent non-Christians an impermissible message.

Does the federal government send non-Christians an impermissible message when, without benefit of St. Nicholas, it sells individual postage stamps depicting Mary and the infant Jesus, as it did in one recent Christmas season, or depicting Mary alone, as it did at another Christmastime? Does the federal government send a message to non-believers that they are "outsiders" when it hires chaplains for its armed forces, its prisons, and its Congress? Or when it places the motto "In God We Trust" on (of all things) its currency? Or when it passes legislation (as it did after some of us had reached adulthood) adding the words "under God" to

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[4] The record does show that the plaintiff is incorrect in her suggestion that the Birmingham crèche is "unadorned" by any other Christmas symbolism. Immediately behind the nativity scene grows an evergreen tree — a typical Christmas tree — which the city decorates, during the holiday season, with colored lights. The city hall property as a whole has perhaps twelve trees, each of which is decorated at Christmastime with five or six strings of lights. Going outside the city hall property, there is testimony that the city decorates the trees of its central business district with over 1,000 strings of Christmas lights. Could the presence of such Christmas lights on the city's trees redeem the nativity scene under a "St. Nicholas too" test? This court evidently thinks not, and I obviously have no basis for quarrelling with that judgment.

the Pledge of Allegiance? Evidently not; yet the Establishment Clause is no less binding on the United States, whose Congress the First Amendment expressly names, than on political subdivisions of individual states.

It is not a persuasive rejoinder, I think, that unlike municipal nativity scenes, some of the federal government's accommodations of religion — the hiring of chaplains, *e.g.* — have been with us since the founding of the Republic. One message conveyed by the relatively recent advent of these nativity scenes, as I shall try to show, is that we have become a more diverse and tolerant society than we used to be. That message hardly stamps nativity scenes with the mark of Cain.

Th e was no State of Michigan when the First Amendment was adopted, but it is safe to assume that the home states of most of the early settlers in what was to become the State of Michigan had no nativity scenes on public display in December of 1791. This was not because of any sense that the states should refrain from "endorsing" Christianity — states commonly did that — but because of considerations that were themselves religious in origin and that helped shaped the æsthetic sensibilities of those whose culture was inherited from the wave of British Protestants who came here in the 17th Century. If it is true today, as I believe it is, that the adherents of most religions (or of no religion) have no particular reason to be offended by the sight of a municipal nativity scene at Christmas, that was certainly not true as far as our Putitan forebears were concerned. "To the Puritans," as Justice Brennan pointed out in his *Lynch* v. *Donnelly* dissent, "the celebration of Christmas represented a 'Popish' practice lacking any foundation in Scripture." 465 U.S. at 721, 104 S.Ct. at 1384. The display of a crèche would have been considered rank idolatry by the Puritans; but the Puritans' strong pre-

judice against Catholicism — a prejudice that did not extend to Judaism, incidentally — has largely vanished from the United States of the 1980s. The rise in the popularity of nativity scenes is not unrelated to (and to some extent has been made possible by) the decline of cultural and religious prejudice in this country and by the gradual dilution of the British Puritanism that has been called the "single most influential cultural force at work in the new nation." A. James Reichley, *Religion in American Public Life* (1985), p. 53.

Although the Puritans would have been appalled at the public display of a nativity scene — with or without a St. Nicholas — they would hardly have been appalled if they could have heard Justice Brewer declare, as he did approximately a century after the adoption of the First Amendment and a quarter of a century after adoption of the Fourteenth, that "this is a Christian nation." *Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 471, 12 S.Ct. 511, 516, 36 L.Ed. 226 (1892). Justice Brewer's words may strike our ears as arrogant (see *Lynch* v. *Donnelly*, 465 U.S. at 718, 104 S.Ct. at 1382, Brennan, J., dissenting), but Justice Brewer spoke for a unanimous Supreme Court, the evidence marshalled in support of his proposition was extensive (see 143 U.S. at pp. 465-71, 12 S.Ct. at 514-16), and at the time they were uttered I have little doubt that Justice Brewer's words would have been widely accepted — by Christian and non-Christian alike — as an accurate statement of fact. Such was the climate of opinion when Congress first enacted legislation declaring Christmas Day a legal public holiday; but no one has ever successfully challenged the constitutionality of the statute (now codified at 5 U.S.C. § 6103) that gives official legal status to the day that many Christians celebrate as the birthday of Christ.

The nation has changed since Justice Brewer's day — doubtless for the better, in some respects — but if our courts no longer speak of us as a "Christian" nation, I think it is still the common sense of our people that nothing in the Constitution requires the state and religion to "be aliens to each other." *Zorach* v. *Clauson*, 343 U.S. 306, 312, 72 S.Ct. 679, 683, 96 L.Ed. 954 (1952), (per Douglas, J., speaking for a divided Court.) If the Constitution's absolute prohibition against any governmental "establishment" of religion were construed as foreclosing all concert of whatever character between government and religion, the result would be totally at odds with what Justice Douglas took to be "the common sense of the matter:"

> "Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; so help me God in our courtroom oaths — these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: God save the United States and this Honorable Court." 343 U.S. at 312-13, 72 S.Ct. at 683.

It would not worry me unduly if a "fastidious atheist or agnostic" found the City of Birmingham's nativity scene offensive on æsthetic or philosophical grounds, or if a modern day Puritan objected to it on religious grounds. I might be able to sympathize with such a point of view, but I would consider it largely irrelevant from a legal standpoint; not everything that gives offense in this world is unconstitutional.

The situation of Birmingham's Jewish citizens, however, calls for special comment; if anyone has a legitimate basis for objecting to the nativity scene, it is they. (It may be appropriate to note, at this point, that there is no Jewish plaintiff in this case.) It was all very well, perhaps, for Benjamin Disraeli to observe, as he did through a character in one of his novels, that "half of Christendom worships a Jew and the other half worships His mother," but the fact remains that for much of the last two millennia the behavior of the Christian church, the Christian state, and many individual Christians toward the people and the religion from which Christianity sprang has ill comported with what many of us understand to be the teachings of Jesus. Our record in this country is better than the record elsewhere, in my submission, and our record has been improving, but there may well be Jews in Birmingham who nonetheless find it discomfiting that their municipal government should make as much as it does of a holiday as closely associated with Christianity as Christmas. I understand that concern, and am less certain of the correctness of my position in this case because of it.

When I examine the "social facts" as dispassionately as I can, however, and try to apply the law I am sworn to uphold as I am given to understand it, I cannot find any constitutional infirmity in what the city has done. I see no anti-Jewish animus in Birmingham's observance of Christmas, and I know of no basis for any claim that the federal courts are empowered, under the First and Fourteenth Amendments, to prohibit Birmingham from observing Christmas in any manner reasonably appropriate to the season. The Fourteenth Amendment, which brought our states and cities under the First Amendment, did not empower the *judiciary* to enact appropriate enforcing legislation, it empowered the *Congress* to do so. Congress itself has made Christmas Day a legal

public holiday, and has not seen fit to prohibit the display of municipal nativity scenes during the holiday season. It may or may not be wise for Birmingham to erect a Christmas crèche — "unadorned" or otherwise — but that strikes me as a question more appropriately answered by the people, through their elected representatives, than by courts of law.

On balance, I think the result reached here runs counter to what Justice Douglas called "the common sense of the matter." It attributes to the City of Birmingham a message I am confident the city never intended to convey, and it attributes more to the words of the Establishment Clause than their history, at least, suggests they can bear. Our decision requires the people of Birmingham either to abandon or reshape one of their civic traditions, and in a small but measurable degree the decision diminishes the people's control over their own lives. I do not believe the Constitution compels this result, on the facts before us. I agree with the holding of the Court of Appeals for the Second Circuit in *McCreary* v. *Stone*, 739 F.2d 716, *supra*, and I would reverse the judgment of the trial court here.

APPENDIX B

MEMORANDUM OPINION AND ORDER

(United States District Court —
Eastern District of Michigan —
Southern Division)

(July 23, 1984)

(AMERICAN CIVIL LIBERTIES UNION, Oakland County Branch, Micki Levin, and Paul J. Fealk, Plaintiffs, v. CITY OF BIRMINGHAM, and City of Oak Park, Defendants — Civ. A. No. 83CV3348DT)

Taxpayer brought suit challenging placement and maintenance of nativity scene by city on lawn of city hall during Christmas season. On parties' cross motions for summary judgment, the District Court, Anna Diggs Taylor, J., held that sponsorship and maintenance of nativity scene by city on lawn of its city hall violated establishment clause.

Plaintiff's motion granted and injunction issued.

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1. ***Constitutional Law*** ☞***84.5(11)***

Sponsorship and maintenance of nativity scene by city on lawn of its city hall violated establishment clause. U.S.C.A. Const.Amend. 1.

2. ***Constitutional Law*** ☞***84(1)***

Governmental practice challenged under establishment clause must satisfy following criteria: practice must have secular legislative purpose; its principal or primary effect must be one that neither advances nor inhibits religion; and it must not foster excessive government entanglement with religion. U.S.C.A. Const.Amend. 1.

James Schuster, Robert A. Sedler, Detroit, Mich., for plaintiffs; Jon H. Kingsepp, Bloomfield Hills, Mich., for defendants.

ANNA DIGGS TAYLOR, District Judge.

This is a civil action, brought pursuant to 42 U.S.C. § 1983 (1981), by which the plaintiff, a resident of the defendant City of Birmingham, challenges as violative of the first amendment of the United States Constitution, the placement and maintenance of a nativity scene by the defendant herein on the lawn of Birmingham City Hall during the Christmas season. There being no dispute as to any of the material facts, this matter is properly before the court on the parties' cross motions for summary judgment. This court has jurisdiction of the instant cause under the provisions of 28 U.S.C. § 1331 (1983). Upon review of the submitted briefs of counsel after oral argument to the bench based upon the following findings of fact and conclusions of law, this court must find in favor of plaintiff and enter a permanent injunction prohibiting the defendant from erecting, supporting, or maintaining a nativity scene on the lawn of Birmingham City Hall.

FINDINGS OF FACT

It is alleged by the plaintiff and admitted by the defendant, and thus this court finds that:

1. Annually, during the Christmas season, from approximately late November through early January of the following year, the City of Birmingham displays a nativity scene on the lawn of the Birmingham City Hall. The nativity scene is comprised of figurines depicting the Christ Child, the Mother Mary, Joseph, three costumed shepherds, and several lambs. Absolutely nothing else is included in the display.

2. In all matters herein, the defendant city was acting as a governmental unit under color of state law, custom or usage, by and through its functionaries, employees, agents or elected officials.

3. The nativity scene was displayed on public property in front of Birmingham City Hall, a place open to the general public. When not displayed on public property, it was stored on public property. The figures in the nativity scene were built at public expense, and the electricity used in connection with the display was furnished out of public funds. The nativity scene was cleaned, restored, repaired and maintained at public expense, and was dismantled and conveyed to storage by public employees at public expense.

CONCLUSIONS OF LAW

[1] A careful analysis of the Supreme Court's recent holding in *Lynch* v. *Donnelly*, __ U.S. __, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984), leads the court to conclude that sponsorship and maintenance of the nativity scene by the defendant on the lawn of its city hall indeed violates the Establishment Clause of the First Amendment of the United States Constitution. In *Lynch*, the Supreme Court held that the inclusion of a nativity scene in an extensive Christmas holiday display sponsored by the city of Pawtucket, Rhode Island did not violate the Establishment Clause, in that the participation of the nativity scene in the display was related to the advancement of a secular purpose and thus, did not impermissibly involve the city government in the endorsement of religion.

The Pawtucket display was situated in a park owned by a non-profit organization and was located in the heart of the Pawtucket shopping district. It consisted of many of the figures and decorations traditionally associated with the winter holiday season, including a Santa Clause [*sic*] house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing a clown, an elephant, a teddy bear, a "SEASONS GREETINGS" banner and hundreds of lights,

as well as the nativity scene. The court in *Lynch* determined that the display was sponsored by the city of Pawtucket in order to celebrate the holiday season and to depict the origins of that holiday, and that there were legitimate secular purposes for the display. There being secular purposes for the display, the court found that there was no attempt by the defendant city to express any kind of subtle government advocacy of a particular religious message.

[2] Although the *Lynch* opinion is replete with references to the significant role that religion has played in the development of our nation, it does not, either on its face or in any implicit proclamation, hold that a nativity scene standing alone, or that any other single religious symbol or group of such symbols erected on public property with public funds, complies with the requirements of the separation of church and state required by our Constitution. With few exceptions, the Supreme Court decisions on this issue have demanded that a governmental practice challenged under the Establishment Clause of the First Amendment satisfy the following criteria:

> First, the practice must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, it must not foster an excessive government entanglement with religion.

Lemon v. *Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971).

Under the three-pronged *Lemon* test, plaintiff here must prevail. First, there is nothing in the defendant's pleadings or arguments, or in the entire record here, to support a finding of a secular purpose for the display of the nativity scene, alone, on municipal property. This

factual scenario is quite distinct from that described in *Lynch*, although the defendant would have the court discover an implied presumption in favor of the "secularization" of the nativity scene, such that the religious symbolism apparent in the case at bar should be somehow overshadowed, balanced or neutralized by the aura of Christmas shopping and holiday cheer. This court cannot so find. The nativity scene here stood alone, on public property, maintained by public monies, for all, the Christians, the Jews, the Muslims, the atheists, all citizens of Birmingham, to view as a municipal endorsement. There were no red and green banners, candy canes, or little toy soldiers about. In short, there was nothing to offset the purely religious cast of the display.

Second, it is clear to the court that the primary effect of the display of the nativity scene by the defendant in the case at bar must be to advance, affirm, approve and otherwise validate the Christian religion, in that implicit government support of the religion represented by the sacred figures must be presumed by onlookers. This is the very consequence against which the Establishment Clause is intended, and the defendant may not strain the *Lynch* decision beyond its narrow parameters. The defendant's contention that the plaintiff must plead and prove that there is no secular purpose for the challenged display is not supported by either the *Lynch* or *Lemon* decisions. Plaintiff has challenged, as a taxpayer of the defendant city, the expenditure of public monies in violation of the Establishment Clause. The defendant has failed to come forward with any evidence by deposition, affidavit or argument which establishes any secular purpose whatsoever for this annual religious display.

Third, while it is not necessarily an "excessive government entanglement with religion" to engage in such activity as the defendant has here (the entanglement

prong of the *Lemon* test being traditionally limited to institutional entanglement), it appears to the court that the solely religious character of the display in question is such that it might cause political divisiveness, another evil addressed and forbidden by the Establishment Clause. The display conveys the restrictive message that Christianity is the chosen religion of the City of Birmingham.

In *McCreary* v. *Stone*, 716 F.2d 739 (2d Cir. 1984), the Second Circuit reversed a federal district court's holding that the defendant Village of Scarsdale was correct in denying plaintiff's applications to display a crèche in a public park during the Christmas holiday season. The district court's decision was *McCreary* v. *Stone*, 575 F.Supp. 1112 (S.D.N.Y. 1983), rendered prior to the Supreme Court's handing down the *Lynch* decision. The Second Circuit, citing *Lynch* and *Widmar* v. *Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981), held that the village's refusal to grant permission to private groups to erect a crèche in Boniface Circle, a village-owned park located in the center of the business district of Scarsdale, for approximately two weeks during the Christmas holiday season, was constitutionally infirm. The appellate court noted the factual background in *Lynch* and *Widmar*.

In *Widmar*, eleven students of the University of Missouri at Kansas City brought suit to challenge a university regulation that prohibited their religious group from using university facilities for meetings, as other student groups did. The Supreme Court held that "the Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place." 454 U.S. at 267-68, 102 S.Ct. at 272-73. The court essentially found in *Widmar* that the provision of an open forum by

the University, in which religious as well as non-religious discussions could take place, would not constitute any governmental endorsement of religious sects or practices.

The Second Circuit, then, relying upon the new *Lynch* decision as well as its "equal access/opportunity to public facilities" reading of the *Widmar* opinion, found that the crèche could be displayed in Boniface Circle without doing violence to the fundamental separation between church and state upon which our nation is founded. The court found that the village's contention-based denial of the applications of the plaintiffs to erect a crèche on public property could not pass muster, in that the village was not asked to become involved in any way with the actual erection and maintenance of the display, and the crèche would be accompanied by a sign which affirmatively disclaimed any support or endorsement on the part of the village. The court noted that Boniface Circle, the proposed site for the crèche display had been the recent site of the Christmas Carol Sing and numerous Christmas, presumably secular, decorations. In discounting the village's argument that a crèche standing alone was substantially different from a crèche in the midst of many more secular items, as in *Lynch*, the court stated that the proper context for analysis was the entire Christmas holiday season, and that the *Lynch* court had made it clear that even without the surrounding traditional Christmas paraphernalia, the crèche, considered within the proper context, could evince a secular purpose as a part of the larger Christmas theme.

This court cannot discover the clarity in the *Lynch* decision upon which the *McCreary* court expounds. The close decision in *Lynch* included a lengthy discussion which noted specifically the secular details of the display which it found to be constitutionally acceptable. Further,

in the case at bar, the entire display was only to be found on public property, having been erected, maintained, illuminated and stored by public employees in public facilities. There were no disclaimer signs involved on the lawn of the Birmingham City Hall. There were no stores for shoppers to be lured into and no Santa Clauses or trees. The defendant's nativity scene, unlike those in *Lynch* and *McCreary*, was entirely city-sponsored and was to remain in full public view much longer than the two weeks requested by plaintiffs in *McCreary*.

This court, then, must find in favor of the plaintiffs and grant their motion for summary judgment. A permanent injunction will issue against the involvement of the defendant City of Birmingham in using public funds to erect, maintain or store the religious display which is the center of this dispute.

IT IS SO ORDERED.

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

(7)

No. 86-389

In The Supreme Court of the United States

October Term, 1986

CITY OF BIRMINGHAM,
Petitioner

v.

AMERICAN CIVIL LIBERTIES UNION and
MICKI LEVIN,
Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

ROBERT A. SEDLER*
Wayne State University Law School
468 West Ferry
Detroit, Michigan 48202
(313) 577-3968
**Counsel of Record*

JAMES SCHUSTER
26211 Central Park Boulevard
Southfield, Michigan 48075
(313) 356-3500

BARBARA HARVEY
925 Ford Building
Detroit, Michigan 48226
(313) 962-2770

Attorneys for Respondent on behalf of the American Civil Liberties Union Fund of Michigan

THE AMERICAN PRINTING COMPANY
615 SECOND AVENUE, DETROIT, MICHIGAN 48226 — (313) 963-9310

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Respondents

STATEMENT OF THE CASE

The petitioner correctly sets forth the procedural history of the case and sets forth the facts in the light most favorable to the petitioner. However, the petitioner fails to state certain other facts testified to by Mr. Kenning, the City Manager, which were noted by the Court of Appeals and by the District Court. Mr. Kenning testified that in Birmingham, "There are Nativity Scenes in every church around," and it is not disputed that the Nativity Scenes "in every church around" are indistinguishable from the Nativity Scene on the Birmingham City Hall front lawn. Mr. Kenning also testified that, "The Nativity Scene, whether it be at City Hall or any other place, does have a religious significance to me," and further that the Nativity Scene is "consistent with the recognition of the Christmas Day and the significance of that date as being the birth of the Christ Child." 791 F.2d at 1566.

The plaintiff, Micki Levin, is not a "nominal plaintiff," as the petitioner suggests. To the contrary, she is a resident of the City of Birmingham, and so is directly affected by the display of the Nativity Scene on the Birmingham city hall front lawn.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. There Are No "Special and Important Reasons" Justifying Review by This Court in the Present Case.

The present case does not involve any "important question of federal constitutional law which has not been, but should be settled by this Court." In this case, the Court of Appeals was called upon to do no more than to apply this Court's controlling precedents and the applicable constitutional doctrine propounded by this Court to the facts before it, and the result reached by the Court of Appeals is fully consistent with such controlling precedents and applicable constitutional doctrine.

In *Lynch v. Donnelly,* 465 U.S. 668 (1984), this court delineated the limited circumstances in which the official display of a Nativity Scene by a governmental body would be consistent with the commands of the Establishment Clause. It held that the *inclusion* of a Nativity Scene in an extensive Christmas holiday season display, otherwise consisting entirely of the secular symbols of Christmas, did not violate the Establishment Clause. This was because the inclusion of the Nativity Scene in the display was related to the secular purpose advanced by the display itself, the official celebration of the Christmas holiday season by the city, and so did not impermissibly involve the city in the endorsement of religion. In that context the Nativity Scene was deemed to have lost most of its religious significance, and did no more than depict the historical origin of what has become a primarily secular holiday. This Court's holding in *Lynch* is clear and needs no further explication.

The Christmas holiday season display that is at issue in the present case consists solely of an unadorned Nativity Scene, the only purely religious symbol of Christmas. The City of Birmingham has maintained this unadorned Nativity Scene as an official Christmas holiday season display on the Birmingham City Hall front lawn for many years. The unadorned Nativity Scene on the Birmingham City Hall

front lawn does not differ in any material respect from the Nativity Scenes displayed in Birmingham "in every church around." The Birmingham City Hall front lawn thus had become indistinguishable during the Christmas holiday season from the Christian churches of Birmingham, and this condition, the District Court and the Court of Appeals found, offends the Establishment Clause.

The Court of Appeals, carefully applying this Court's holding in *Lynch* to the facts of the present case, concluded that an official display of an unadorned Nativity Scene on a city hall front lawn during the Christmas holiday season had the purely religious effect of endorsing Christianity. There was no way that it could conclude otherwise in light of the holding and rationale of *Lynch*. As this Court emphasized repeatedly in that case, it was the *inclusion* of the Nativity Scene in the extensive and otherwise purely secular Christmas holiday season display which, *in that context*, deprived the Nativity Scene of any religious effect. As Justice O'Conner stated in *Lynch:* "The evident purpose of including the creche in the larger display was not the promotion of the religious content of the creche but celebration of the public holiday through its traditional symbols. Celebration of public holidays, which have cultural significance even if they also have religious aspects, is a legitimate secular purpose." 465 U.S. at 691 (O'Conner, J., concurring).

When the Nativity Scene stands on the city hall front lawn alone, unaccompanied by the panoply of secular symbols that were present in *Lynch*,. and indistinguishable from the Nativity Scenes displayed on the front lawns of the Christian churches of Birmingham, the only possible effect of the display is an official endorsement of Christianity. Since the Establishment Clause requires that the government "must pursue a course of complete neutrality toward religion," *Wallace v. Jaffee*, ___ U.S. ___, 105 S.Ct. 2479, 2492 (1985), such an official endorsement of Christianity by

a governmental body is a pristine violation of the Establishment Clause.[1]

The present case, therefore, involves no important question of federal constitutional law, necessitating the exercise of jurisdiction on certiorari by this Court.

II. The Federal Courts of Appeal Are in Agreement That Any Official Display of a Purely Religious Symbol by a Governmental Body Is Violative of the Establishment Clause.

The decision of the Court of Appeals in the present case is in accord with recent decisions of other federal courts of appeal, holding violative of the Establishment Clause any official display of a purely religious symbol by a governmental body. In *American Civil Liberties Union of Illinois v. City of St. Charles*, 794 F.2d 265 (7th Cir., 1986), decided just five days before the present case, the Seventh Circuit invalidated a city's display of a lighted Latin cross on a city building during the Christmas holiday season. In *Friedman v. Board of County Commissioners of Bernalillo County*, 781 F.2d 777 (10th Cir., 1985), the Tenth Circuit invalidated a county government's use of a seal that contained a Latin cross and a Spanish motto, translated into English as "With This We Conquer." In *American Civil Liberties Union of Georgia v. Rabun County Chamber of Commerce*, 698 F.2d

[1] In his dissent in the case at bar Judge Nelson derisively referred to the majority's holding as embodying a "St. Nicholas too" test, and said that such a test was not required by this Court's holding in *Lynch*. 791 F.2d at 1569. With all due respect, this remark completely misperceives the nature of this Court's holding in *Lynch*, and distorts the careful application of the *Lynch* holding by the Sixth Circuit majority in the present case. This Court's holding in *Lynch* represented an application in the particular context of that case, of the well-settled Establishment Clause principle that where governmental action advances a valid secular purpose and has a primarily secular effect, there is no violation of the Establishment Clause merely because that action has an incidental religious effect as well. *C.f. McGowan v. Maryland*, 366 U.S. 420 (1961). This was how the majority of the Court viewed the inclusion of the Nativity Scene in the extensive Christmas holiday season display in *Lynch*. But the display of an unadorned Nativity Scene can only have a religious effect, and so is necessarily violative of the Establishment Clause.

1098 (11th Cir., 1983), the Eleventh Circuit invalidated the display of a lighted Latin cross in a state park.[2] As these cases indicate, the courts of appeal are in clear agreement that any official display of a purely religious symbol by a governmental body is violative of the Establishment Clause.

In a spurious effort to find a conflict among the courts of appeal, the petitioner relies on *McCreary v. Stone*, 739 F.2d 716 (2d Cir., 1984), *aff'd. by an equally divided Court sub nom. Board of Trustees of Village of Scarsdale v. McCreary*, ___ U.S. ___, 105 S.Ct. 1859 (1985). That case, of course, did not involve the official display of a religious symbol by a governmental body, but a city's refusal to allow a private group to display a Nativity Scene in a traditional public forum during the Christmas holiday season. The Second Circuit held that so long as this display in a public forum carried an appropriate disclaimer message, there was no danger that the city would be associated with the religious symbol. This being so, the refusal of the city to permit the display was held to be violative of the First Amendment's equal access principle.

In the course of its opinion, the Second Circuit expressed the view that this Court's holding in *Lynch* was not based primarily on the fact that the Nativity Scene was included in the extensive Christmas holiday season display, but on the fact that the Nativity Scene was displayed during the Christmas holiday season itself. On this basis the petitioner argued before the Court of Appeals that the Second Circuit's decision in *McCreary* should be read as upholding the display of an unadorned Nativity Scene on the city hall front lawn. While the Sixth Circuit indicated that if this is what the Second Circuit held in *McCreary*, it was in disagreement with that holding, 791 F.2d at 1566, the disagreement would have to be with the Second Circuit's analysis

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[2] In *Burelle v. City of Nashua*, 599 F.Supp. 792 (D.N.H. 1984), the District Court, in reliance on the District Court's decision in the present case, invalidated a city's display of a Nativity Scene on the grounds of a building that housed municipal offices.

rather than with the actual holding in that case. The holding in *McCreary* necessarily was limited to the matter of denial of equal access to religious expression in a public forum, because that was the only issue before the Second Circuit in that case.

There is no conflict between decisions of the courts of appeal for purposes of Supreme Court Rule 17 unless two courts of appeal have decided the same question in a contrary manner. The fact that one court of appeals may have analyzed a decision of this Court in a manner that differs somewhat from the analysis of the same decision by another court of appeals creates no conflict between the courts of appeal for purposes of Rule 17, and furnishes no necessity for the exercise of jurisdiction on certiorari by this Court.

When squarely faced with the issue of whether a governmental body may officially display a purely religious symbol on public property, the courts of appeal have all come to the same conclusion. Such an official display of a purely religious symbol by a governmental body has been held, without qualification, to be violative of the Establishment Clause. Since the official display of purely religious symbols by governmental bodies has consistently been held unconstitutional by the courts of appeal, there is no need for this Court to exercise jurisdiction on certiorari in order to resolve any conflict among the federal courts of appeal.

CONCLUSION

For the reasons stated herein, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

ROBERT A. SEDLER*
Wayne State University Law School
468 West Ferry
Detroit, Michigan 48202
(313) 577-3968
**Counsel of Record*

JAMES SCHUSTER
26211 Central Park Boulevard
Southfield, Michigan 48075
(313) 356-3500

BARBARA HARVEY
925 Ford Building
Detroit, Michigan 48226
(313) 962-2770

Attorneys for Respondents on behalf of the American Civil Liberties Union Fund of Michigan

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No. 86-389

IN THE
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CITY OF BIRMINGHAM,
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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF AMICUS CURIAE CHRISTIAN LEGAL SOCIETY IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

MICHAEL J. WOODRUFF
Counsel of Record
SAMUEL E. ERICSSON
KIMBERLEE W. COLBY
MICHAEL A. PAULSEN
Post Office Box 1492
Merrifield, Virginia 22116
(703) 560-7314

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-389

CITY OF BIRMINGHAM,

Petitioner,

v.

AMERICAN CIVIL LIBERTIES UNION and MICKI LEVIN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF AMICUS CURIAE CHRISTIAN LEGAL SOCIETY IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

The Christian Legal Society is a non-profit Christian professional association, founded in 1961, with a present membership of 3,500 judges, attorneys, law professors, and law students. Concerned about constitutional rights, it founded the Center for Law and Religious Freedom in 1975 to protect and promote the freedoms guaranteed by the First Amendment through advocacy and education.

The letters from the parties consenting to the filing of this brief are submitted herewith to the Clerk pursuant to Rule 36.1.

SUMMARY OF ARGUMENT

The petition in No. 86-389, *American Civil Liberties Union v. City of Birmingham*, 791 F.2d 1561 (6th Cir. 1986), presents a straightforward question of the application of this Court's decision in *Lynch v. Donnelly*, 465 U.S. 668 (1984). The Court of Appeals has unconvincingly distinguished *Lynch* in such a manner as to suggest that the legal rationale of the *Lynch* holding is inapplicable beyond the particular facts of that case. *Amici* support the granting of a writ of certiorari to review the judgment below on the grounds that it is contrary to *Lynch* and, perhaps more importantly, that it is representative of a disturbing trend among lower courts to refuse to follow this Court's opinion in *Lynch* in closely analogous situations.

In addition, *amici* wish to note for the Court similarities and differences between the issues in this case and the issues present in several other petitions for certiorari now before this Court, as the relationships among these cases may be important in determining whether or not to grant the writ in No. 86-389. Specifically, the genre of cases typified by this lawsuit—Establishment Clause challenges to symbolic or ceremonial references to religion—share frequently latent (and occasionally obvious) problems of justiciability not considered in *Lynch v. Donnelly*. The jurisdictional question of standing to raise such attacks on government actions under the Establishment Clause is a recurring and unsettled one, the resolution of which could have lasting impact on the growing use of federal courts as a forum to air grievances about state symbolic or traditional uses of religion via lawsuits brought by persons who have suffered no cognizable injury as a result of such practices.

ARGUMENT

THE DECISION BELOW IS CONTRARY TO *LYNCH v. DONNELLY*, 465 U.S. 668 (1984), AND SYMPTOMATIC OF A TREND AMONG LOWER COURTS TO READ *LYNCH* AS LIMITED TO ITS FACTS.

1. The facts of the instant case are nearly identical to those presented in *Lynch*: A municipality has erected and maintained a nativity scene during the Christmas holiday season. While the majority below and the plaintiffs' complaint referred to the creche as "unadorned", the dissent below accurately notes the presence of a light display, and a Christmas tree in the backdrop of the creche (Pet. App. at A21, n.4 (Nelson, J., dissenting)), and chides the majority for creating a "St. Nicholas, too" test as the *sole* basis for distinguishing this Court's holding in *Lynch*. *Id.* at A18. (Nelson, J., dissenting).[1]

The panel majority's proffered distinction based upon minor factual differences is wholly unpersuasive. The distinction rests on the notion that the outcome of *Lynch* somehow turned on the "neutralization" of the religious content of the creche by virtue of the particularly cluttered, secular physical environs in which it stood—a display including plastic elves, a sleigh, reindeer and bells. However, this characterization of the holding was emphatically rejected by the *Lynch* majority. 465 U.S. at 685 n.12. The context in which the creche was to be considered for Establishment Clause purposes was not the context of the display but the setting of the creche in the context of the Christmas holiday season. *Id.* at 679; *id.* at 680; *id.* at 685.

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[1] Another possible factual distinction, not relied upon by the majority below, is the fact that the *Birmingham* creche was on public property, while the *Lynch* creche was on private property but maintained at public expense.

Nonetheless, with a few notable exceptions[2], it has been the above mischaracterization of the holding of *Lynch* which has misled lower courts in their treatment of this recurrent issue. Were the Court of Appeals' holding in *Birmingham* an isolated occurrence, it might be thought aberrational and review by this Court would be unnecessary so soon after *Lynch*. Regrettably, however, the decision below exemplifies a trend among lower courts, which have read *Lynch* in an unduly narrow fashion, refusing to follow it outside of its own facts. *See, e.g., City of St. Charles v. American Civil Liberties Union*, 794 F.2d 265 (7th Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3175, No. 86-351; *Libin v. Town of Greenwich*, 625 F.Supp. 393 (D.Conn. 1986) (enjoining inclusion of cross in municipal Christmas display).

This case presents no occasion for an extensive discussion of Establishment Clause case law or doctrine. The relevant considerations were evaluated at length in *Lynch*. But it is necessary to make clear to local officials, generally anxious to avoid expensive litigation over such matters, that this Court has not adopted a "St. Nicholas, too" test for the constitutionality of municipal Christmas displays that include a nativity scene. The issues involved are so clearly settled, and the decision below so clearly contrary to those principles, that this case may be an appropriate candidate for granting the writ and

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[2] *McCreary v. Stone*, 739 F.2d 716 (2d Cir. 1984), *aff'd by an equally divided Court sub nom. Board of Trustees of Village of Scarsdale v. McCreary*, 472 U.S. ——, 105 S.Ct. 1859 (1985). *Cf. Conrad v. City and County of Denver*, —— P.2d —— (Colo.), Slip op. No. 84SA313 (September 8, 1986) (finding *Lynch* persuasive, Colorado Supreme Court finds that municipal creche does not violate state constitution). There is no necessary "conflict" among lower courts within the meaning of this Court's Rules 17.1(a) and (c), as the resolution of *McCreary* turned primarily on a "public forum" question and *Conrad* decided only a question of state constitutional law. Nonetheless, it is clear that the lower courts have not been uniform in their treatment of the meaning and scope of the *Lynch* decision.

summarily reversing the judgment below as being contrary to *Lynch*. Alternatively, the writ should be granted and the case set for full briefing and argument.

2. We note that another petition, No. 86-351, *City of St. Charles v. American Civil Liberties Union*, presenting similar issues in a slightly different factual context—the inclusion of a lighted cross as part of a municipal Christmas display—is also before this Court. We suggest that if the writ is granted in the *Birmingham* case, it should be granted in the *St. Charles* case as well, with the two cases set for joint argument. Were review granted only in *Birmingham* (and the judgment below ultimately reversed), the unintended impression might be conveyed of a "creche-cross" bright line distinction. This is not to say that the two cases might not be capable of different dispositions, but only to say that such different outcomes ought not be produced *sub silentio* through the discretionary review process.

We suggest further that, should this Court grant the writ in either or both cases, the parties be directed to brief the threshold jurisdictional issues of standing to sue. This question is especially problematic in the *St. Charles* case and should not go unnoticed simply because it is not raised in the petition.

Indeed, the jurisdictional question—explicit in *St. Charles* and implied in *Birmingham*—may well be of greater ongoing importance to the conduct of litigation in this area than would a decision on the merits of either case. Lower federal court decisions already reflect a good deal of confusion in this area, recognizing standing on exceptional and peculiar grounds in Establishment Clause cases. *See ARM v. Baker*, 80 Civ. 5590 (S.D.N.Y. 1986), *petition for certiorari denied*, 55 U.S.L.W. 3235 (U.S. October 6, 1986) (No. 86-157) (recognizing special "Establishment Clause standing" to sue the government to compel it to take certain policy action against a religious group); *Hawley v. City of Cleveland*, 773 F.2d 736

(6th Cir. 1985), *cert. denied*, 106 S.Ct. 1266 (1986) (standing to challenge privately-run chapel in rented space at airport based on abridgement of use and enjoyment of airport terminal and avoidance of unwelcome religious practices); *American Civil Liberties Union v. Rabun County Chamber of Commerce*, 698 F.2d 1098, 1102-09 (11th Cir. 1983).

The "sense" which the Seventh Circuit's opinion in *St. Charles* endeavors to make of this trend is plainly inconsistent with this Court's holding in *Valley Forge Christian College v. Americans United*, 454 U.S. 464 (1982). Judge Posner's opinion for the Seventh Circuit devotes several pages to its conclusion that at least one of the plaintiffs had standing to sue based on her decision to drive a different route at night to avoid seeing the cross. Judge Posner reasons that were such an injury, "tenuous though it be," insufficient to confer standing, many Establishment Clause disputes would be nonjusticiable, since "no one would have standing." No. 86-351, App. at 4a-5a. Recognizing that not all alleged constitutional violations are justiciable, Judge Posner asserts that this Court's cases recognize what amounts to an exception to traditional Article III standing requirements in Establishment Clause cases.

The mischief such a view can work in church-state litigation is manifest. Establishment Clause cases become not vehicles for vindication of individual rights of religious freedom from the coercive pressures of the majority but special platforms from which to complain about government actions with which one disagrees. Such suits degrade the lofty purposes of the Establishment Clause. While these disputes often generate considerable acrimony within their communities, the acrimony seems less related to a concern on the part of either side about their *religious liberty*, but more about

the insistence of the other side on having its own way.[3] Those bringing suit resent the choice of the community (usually arrived at quite informally); the community takes offense at litigation by persons whose chief complaint is that the display offends their sense of the proper separation of church and state. *Cf., Valley Forge*, 454 U.S. at 482-87. Perhaps the intolerance and stubbornness of each side is rightly condemned by the other. But the intensity of emotions on both sides does not itself generate a dispute of constitutional dimension.

It is because of the acrimony that such suits arouse and the extraordinarily sensitive nature of the issues involved that it is essential that such suits be brought by a proper plaintiff. The issues would then be properly framed to address a genuine question of deprivation of religious liberty, not an academically interesting question of whether some government act is *ultra vires.*

Several points need to be clarified in this regard. First, there is no general "Establishment Clause exception" to the fundamental requirements of Article III standing, and, in light of *Valley Forge*, the dictum in *School District of Abington v. Schempp*, 374 U.S. 203 (1963), cannot be read to have created one. Second, the "injury" that results from a violation of the Establishment Clause is an infringement to a species of *religious liberty*—a burden on the right of persons to exercise the religion of their choice or none at all, or the communication by the state of a message of disapproval of that

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[3] As a Denver newspaper editorial described it, commenting on the final resolution of the *Conrad* case, "[t]he lawsuit challenging the nativity scene was actually more divisive than the religious display itself. Yet this is typical of such lawsuits. They represent a streak of unreasonableness among a very few people who seek to cleanse every last speck of religious connotation from the public domain." Rocky Mountain News, Thursday, September 11, 1986, p. 66 col. 3. *See also Lynch*, 465 U.S. at 684.

choice.[4] Third, in certain circumstances third parties may assert this religious liberty interest of others in conjunction with some other "actual injury" to themselves, but only in those limited circumstances when third-party standing is recognized generally, *see, e.g., Craig v. Boren*, 429 U.S. 190 (1976); *Barrows v. Jackson*, 346 U.S. 249 (1953); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *cf. Flast v. Cohen*, 392 U.S. 83 (1968),[5] such circumstances *not* including those where the asserted third-party injury is simply some restatement of the psychic injury suffered by seeing supposed violations of the religious liberty of others, rejected in *Valley Forge*.

The record in *St. Charles* obviously presents the justiciability problem in sharper relief than does the *Birmingham* record. Nonetheless, the issue is presented by both cases in that each plaintiff alleges not a violation of his or her own religious liberty through government coercion or discrimination but only his or her subjective belief that the display in question violates the Establishment Clause. The issue whether such claims are justiciable under *Valley Forge* is worthy of this Court's review.

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[4] *See Wallace v. Jaffree*, 105 S.Ct. 2479, 2497 (1985) (O'Connor, J., concurring in the judgment) (government "endorsement" of a particular religious practice "infringes the religious liberty of the non-adherent" through indirect coercive pressure upon religious minorities to conform).

[5] The holding in *Flast* can be viewed in terms of third-party standing. Taxpayer standing was recognized for certain kinds of Establishment Clause cases on the premise (somewhat tenuous, we believe) that a taxpayer suffers redressable injury by virtue of infringement of *someone else's* religious freedom, and that taxpayers are appropriate parties to assert the rights of such persons. Taxpayer standing was unavailable to plaintiffs in *St. Charles*, as no government funds were alleged to have supported the cross-shaped lighting display. No. 86-351. Pet. App. at 3a.

These issues are implicated in yet another petition before the Court. *American Baptist Churches v. Reagan*, 786 F.2d 194 (3d Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3094 (U.S. July 24, 1986) (No. 86-113)).

CONCLUSION

For these reasons, *amici* urge this Court to consider the petition for certiorari in No. 86-389 together with the petition in No. 86-351, grant the writ in both cases, and direct the parties to brief and argue both the jurisdictional and substantive questions in each case.

Respectfully submitted,

MICHAEL J. WOODRUFF
Counsel of Record
SAMUEL E. ERICSSON
KIMBERLEE W. COLBY
MICHAEL A. PAULSEN
Post Office Box 1492
Merrifield, Virginia 22116
(703) 560-7314

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